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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 18 2009

SRC 07 235 53077

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a nephrologist, treating and researching diseases of the kidney. At the time she filed the petition, the petitioner was a clinical fellow at Boston (Massachusetts) Medical Center, affiliated with Boston University. She subsequently became a research fellow in 2008. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on August 1, 2007. In a statement accompanying the initial filing, counsel stated:

> Many physicians limit their work to a small, limited clinical field; others focus on research. [The petitioner] is one of a select group of physician-scientists who works in both areas. . . .

> [The petitioner] has an extraordinary ability to treat and diagnose diseases of the kidney as well as perform a multitude of dialysis, radiology and specialized surgical procedures. In addition, [the petitioner] is vital to the care of post-kidney transplant recipients. [The petitioner's] expert specialization in temporary hemodialysis catheter placement, tunneled dialysis catheter placement, peritoneal dialysis catheter placement, kidney biopsy, and renal ultrasound, has made her an expert on the proper diagnosis and management of kidney diseases. Less than 5% of nephrologists in the United States are capable of performing such highly complex and delicate procedures.
>
> . . . [The petitioner] is also one of the leading physician-scientists in this field in the United States. . . . She has literally presented her innovative research to thousands of physicians throughout the world.

Counsel went on at some length with repeated claims to the effect that the petitioner "is regarded as one of the foremost nephrologists in the nation today." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We must judge the record by the evidence it contains. From the present organization of the record, it appears that the petitioner's initial filing contained no documentary evidence at all; it contained only counsel's statement, the petitioner's *curriculum vitae*, and various forms.

Counsel stated: "Please see attached Letters of Support from Independent Experts Nationwide. Please note that these letters come from experts in the field from around the country both from institutions at which [the petitioner] has worked and institutions at which she has not worked." Counsel did not quote from any of the letters, or identify any of the authors. We can find no letters in the record that accompanied the initial submission.

Counsel stated "there is a growing shortage of experienced nephrologists and the need for nephrologists [is] on the rise." There exist special provisions for physicians in shortage areas, found in the statute at section 203(b)(2)(B)(ii) of the Act and in the regulations at 8 C.F.R. § 204.12. The petitioner, however, has made no attempt to meet the evidentiary requirements for physicians in shortage areas, instead claiming a waiver under the more general guidelines set forth in *Matter of New York State Dept. of Transportation*. Under that precedent decision, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification, because the very purpose of labor certification is to demonstrate that qualified United States workers are not available. *See Matter of New York State Dept. of Transportation* at 218.

On July 21, 2008, the director issued a request for evidence (RFE), stating that the record lacked documentary support for counsel's claims. The director specifically requested evidence regarding independent citation of the petitioner's published work, and information regarding the petitioner's recent research projects, as well as "documentary evidence which supports [counsel's] assertion" that "less than 5% of nephrologists in the United States are capable of performing" the procedures listed by

counsel. The director also noted that counsel "stated that letters of support were included . . . but these were not found."

In response, counsel stated:

> [O]fficial statistics as to the percentage of experts performing kidney biopsy [are] not available. Kidney biopsy remains however one of the most complex procedures in the field of nephrology which is why there is such a small number of experts capable of performing these types of procedures. The best evidence of this are [*sic*] the letters from experts in the field attesting to the complexity of the procedure and the small percentage of experts capable of the procedure.

The above assertion does not explain the source of the "5%" figure that counsel provided in the initial filing. If there are no "official statistics," then counsel could not provide a reliable percentage.

With regard to the witness letters, several such letters accompanied the RFE response. All the letters are dated after the July 2008 issuance of the RFE, and so they clearly did not exist a year earlier when the petitioner filed the petition. Letters written in late 2008 cannot possibly have been the source for counsel's July 2007 claims. We conclude, therefore, that counsel's "5%" figure was baseless and arbitrary.

Counsel additionally offered a number of arguments and claims relating to the evidentiary standards listed at 8 C.F.R. § 204.5(h)(3). However, these regulations pertain to a different classification, relating to aliens of extraordinary ability under section 203(b)(1)(A) of the Act.

Letters from six witnesses, all in the northeastern United States, accompanied the petitioner's response to the RFE. As with counsel's statement, the witness letters contain frequent uses of language that pertains to extraordinary ability petitions, which is not the classification that the petitioner sought in this proceeding.

Half of the witnesses are Harvard Medical School faculty, on the staff of Brigham & Women's Hospital in Boston. [redacted] asserted:

> [The petitioner] is reputed as one of the top nephrologists in the United States and has been a pioneer in the field. . . .
>
> [The petitioner] is unique in the field of nephrology because she is a physician-specialist who can combine her clinical expertise with top-notch, rigorous academic research. For example, she has led pioneering research on the role of cPLA2-interacting protein (PLIP) on cell cycle. . . . Her research contributions are truly invaluable to the field as a whole.

> [The petitioner] has further distinguished herself by demonstrating extraordinary clinical and diagnostic abilities, not only in nephrology but also in cardiology.

[redacted] stated that the petitioner "is uniquely qualified to manage [kidney] transplant patients. . . . [The petitioner] is unique in the field of nephrology because she is a physician-scientist and has achieved the unique ability to combine rigorous academic research with vast clinical expertise." Several witnesses offer comparable assertions that it is almost unheard of for a clinical nephrologist to perform academic research. This is a testable claim, subject to documentary support or refutation. The petitioner could, for instance, submit documentation to show that only a small number of the researchers who have published kidney research in the past few years are licensed, practicing physicians. The record, however, offers no documentary support for the claim that nephrologists rarely combine research with clinical practice. Repetition by witnesses does not make the claim more credible, because none of the witnesses has provided documentary or statistical evidence to support the assertion.

called the petitioner "one of the top young academic nephrologists in the United States . . . and one of the world's pioneering researchers in nephrology."

Boston University Professor [redacted] Chief of the Renal Section at Boston Medical Center, stated that the petitioner "currently stands at the very top of the field of nephrology," and that the petitioner is among "the most prolific researchers."

[redacted] of Albert Einstein College of Medicine, where the petitioner worked from 2004 to 2006, credited the petitioner with "some of the most innovative and significant research of our time."

The only witness who does not work at an institution where the petitioner has trained is Assistant [redacted] of Stony Brook University, who deemed the petitioner "one of a small group of the most talented nephrologists in the United States. . . . It is a well-known fact that [the petitioner] has distinguished her self as one of the most specialized nephrologists in the United States today." [redacted] claimed no training or expertise in nephrology; his specialty is radiology. The record contains two letters from [redacted] dated one day apart (October 6 and 7, 2008). The letters are nearly but not entirely identical. [redacted]'s first letter indicated that the petitioner "is also Board Certified in Internal Medicine/Nephrology." That assertion is missing from the second letter.

Significantly, in the RFE, the director had specifically requested evidence that the petitioner is, in fact, board certified. In response, counsel stated that the petitioner "was not board certified in nephrology at the time of filing of this petition." This wording implies that the petitioner later became board certified in nephrology, but the record contains no evidence of such certification. One of the petitioner's supervisors, Prof. Salant, indicated that the petitioner is board certified in internal medicine, but he did not claim that the petitioner is board certified in nephrology. If the petitioner

was not board certified in nephrology when [redacted] wrote that the petitioner was so certified, then [redacted] letter contains inaccurate information and is, therefore, not credible.

Apart from [redacted], who is not a nephrologist and whose credibility is questionable, all of the witnesses named above have worked with the petitioner. The record offers no objective support for their claim that the petitioner is well-known and deeply influential in her field. As noted earlier, an unsubstantiated claim does not become more credible or irrefutable simply by brute repetition.

The petitioner submitted copies of only two articles that contain independent citations of her work, a very low total that does not readily suggest that she is, as witnesses have claimed, a particularly influential researcher. The petitioner submitted four other printouts that are identified as "citations" but are not citations. These claimed "citations" are search engine results and database printouts, rather than bibliographic references to the petitioner's work in published articles.

A physician profile from HealthGrades identified the petitioner's specialty as "Internal Medicine," with no reference to nephrology.

The remainder of the petitioner's submission shows that she is active as a physician and as a researcher, but does not establish the acclaim or influence that her colleagues in Boston and New York attribute to her. A January 28, 2008 letter refers to "an educational grant and stipend," indicating that Boston Medical Center considered the petitioner's education to be ongoing half a year after the filing date.

The director denied the petition on November 7, 2008, stating that a shortage of nephrologists does not warrant a national interest waiver, and that the witnesses' claims, while emphatic, lack documentary support in the record. The director noted [redacted] erroneous assertion that the petitioner is board certified in nephrology, and counsel's frequent use of inapplicable language relating to aliens of extraordinary ability.

On appeal, in the cover letter accompanying the appellate brief, counsel states that the "petitioner wishes to timely appeal the decision to deny her I-140 [petition] for classification as an alien of extraordinary ability." Elsewhere on the same cover letter, counsel correctly refers to the petition as "EB-2 national interest waiver." The confusion continues in the brief itself, in which counsel correctly refers to "the national interest waiver petition" before devoting most of the brief to the extraordinary ability criteria listed at 8 C.F.R. § 204.5(h)(3). The burden is on the petitioner to select the appropriate classification rather than to rely on the director to infer or second-guess the petitioner's intended classification. The Form I-140 petition was clearly marked under Part 2 as a petition filed for classification as "[a]n alien applying for a National Interest Waiver . . . ." and both the petitioner and counsel signed the Form I-140. A request for a change of classification will not be entertained for a petition that has already been adjudicated. A post-adjudication alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In addition, the Ninth Circuit has determined

that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the director's adjudication of the I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[1] If the petitioner now seeks classification as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, then she must file a separate Form I-140 petition requesting the new classification.

Counsel stated that, by learning new techniques and then teaching those methods to others, the petitioner is "creating a ripple effect in making the performance of these . . . procedures more widespread on a national level." The same can be said of anyone who learns a technique and then trains others. Therefore, this activity does not distinguish the petitioner from others in similar positions.

Counsel stated that the petitioner's "research . . . has had a national impact as is evidenced by her prolific record of publication and presentation." The record contains nothing to show that the petitioner's publication history has been especially prolific in comparison to others in her field. Several of the witnesses' *curricula vitae* list page after page of published articles, whereas the petitioner has shown only a handful of articles.

Counsel asserts that the petitioner "is indeed the type of unique physician scientist for whom the national interest waiver . . . was created." Counsel does not cite any legislative history to support the claim that Congress created the waiver with "physician scientists" in mind. The plain wording of the statute indicates that members of the professions holding advanced degrees are typically subject to the job offer requirement. When Congress amended the statute in 1999 to add a provision regarding certain physicians at section 203(b)(2)(B)(ii), there was no mention of "physician scientists."

The remainder of counsel's brief relates to the petitioner's misplaced extraordinary ability claim. Because the petitioner did not request classification as an alien of extraordinary ability when she filed the petition, these arguments are off point here. As with the rest of this proceeding, counsel's arguments consist mainly of exaggerated claims with little or no documentary support, and inflated assertions regarding the evidence that the petitioner has submitted.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job

[1] *See* http://www.whitehouse.gov/omb/circulars/a025/a025.html.

offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.